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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1559

MILTON PARNESS and BARBARA PARNESS,
Petitioners,

—v.—

UNITED STATES OF AMERICA,
Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Milton Parness and Barbara Parness pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on January 7, 1976 which affirmed an order denying petitions a new trial which was previously entered against petitioners in the United States District Court for the Southern District of New York on September 29, 1975.

Opinions Below

Following the entry of the order in the District Court, the Petitioners appealed to the Court of Appeals. The as yet unreported opinions of the Court of Appeals

and the District Court are set in Appendices A and B. (1a-12a).[1]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

Questions Presented for Review

Following a jury trial in the United States District Court for the Southern District of New York (Bonsal, *J.*) petitioners were found guilty upon two counts of causing interstate transportation of stolen property and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, each count being in violation of 18 U.S.C. Section 2314. In addition, Petitioner Milton Parness was found guilty of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity, in violation of 18 U.S.C. section 1962(b). The Court of Appeals for the Second Circuit affirmed the conviction, *United States* v. *Parness*, 503 F.2d 430 (1974); and this Court denied

[1] The following abbreviations are used in the petition:

"a" is a reference to the Petitioners' Appendix which appears following the conclusion of this petition: The Appendix contains the opinion of the Court of Appeals, its decision on petitions' motion for recall of its mandate (Appendix A); the decision of the Court of Appeals denying petitioners' motion for reargument and suggestion for rehearing on banc. (Appendix C); the opinion of the District Court (Appendix B), and the applicable statutes (Appendix D).

"J" is a reference to the Appendix submitted to the Circuit Court of Appeals which contains all the relevant post conviction proceedings. These volumes will be certified to this court. "R" is a reference to the trial transcript.

certiorari, *Parness* v. *United States*, 419 U.S. 1105 (1975). After the denial of certiorari, petitioners moved in the District Court for a new trial, pursuant to Rule 33, of the Federal Rule of Criminal Procedure upon the grounds that, *inter alia*, the prosecution's key witness had perjured himself as to several matters and the prosecution had intentionally suppressed evidence favorable to the defense. During the pendency of the motion, additional evidence of suppression by the government was presented to the District Court as additional proof of the aforementioned allegations.

The questions are:

(1) Did the court below err in refusing to grant the petitioners a new trial in view of the prosecution's deliberate non-disclosure of exculpatory material and material producible under 18 U.S.C. Section 3500?

(2) Did the Court below err, in view of the government's admission of non-disclosure, by failing to grant petitioners an evidentiary hearing on the issue of deliberateness of the government's suppression?

(3) Was the District Court's finding proper when it held that an Assistant United States Attorney who tried petitioners' case should not be charged with the knowledge of a "strike forkce prosecutor" who, although not directly involved in the trial, was responsible for the overall investigation and preparation of petitioners' case for trial?

(4) Did the Court of Appeals err in applying an erroneous standard in denying a new trial based on newly discovered evidence relating to the perjury of its main witness.

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment (due process of law) and the Sixth Amendment (right to confrontation of witness) of the United States Constitution.

The Federal statutory provisions involved are 18 U.S.C. Section 3500 (production of statements and reports of government witnesses).

These Constitutional provisions and statutes are reproduced in Appendix D hereto.

Statement of Facts

A. The Chronology on the Motion for a New Trial

On August 2, 1973, superseding indictment 73 Cr. 750 was filed in the Southern District of New York. That indictment charged Petitioner Milton Parness with acquiring control of the St. Maarten Isle Hotel and Casino (Hotel Corp.) through a pattern of racketeering in violation of Title 18 U.S.C., Sections 1961, 1962(b), and 1963 and 2 (counts 1 through 3 inclusive). Counts 4, 6 and 7 of the same indictment charged the Petitioner with the interstate transportation of money which had been stolen, converted and taken by fraud in violation of Title 18 U.S.C. Sections 2314 and 2. Count 5 charged Petitioners with causing and inducing Allan Goberman to travel in interstate commerce pursuant to a scheme to defraud in violation of Title 18 U.S.C., Sections 2314 and 2. (J. 6-15).[2]

[2] Counts 4 through 7 inclusive also constituted the individual acts of racketeering which formed the pattern of racketeering charged in counts 1 through 3.

At the conclusion of the government's case, counts 2, 3, and 7 were dismissed by the District Court. At the conclusion of all the evidence, Petitioner Milton Parness was convicted on counts 1, 4, 5, and 6, and Barbara Parness was convicted on counts 4, 5 and 6. On June 27, 1974, Petitioners' convictions were affirmed by the United States Court of Appeals, *United States* v. *Parness*, 503 F.2d 430 (2d Cir.), *cert. den.*, 419 U.S. 1105 (1975).

On or about January 22, 1975, Petitioners moved in the United States District Court for the Southern District of New York for an order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds *inter alia*, that the testimony of Allan Goberman the prosecution's witness-in-chief was false as to material matters; that there existed evidence of material facts not yet presented and heard which required vacation of judgment of conviction and sentences in the interest of justice; and that at the time of trial, the United States Attorney knew or should have known of material evidence favorable to the Petitioners which was not disclosed or made available to them (J. 16-17).

In support of that application, there was submitted to the District Court *inter alia*, Petitioner's affidavits; three depositions given by Allan Goberman the prosecution's witness-in-chief; and the depositions of one John Blandino (J. 19-J. 321).[3]

During the subsequent course of the proceedings, counsel for the petitioners submitted to the Court below a supplementary affidavit in further support of the pending Rule 33 motion (J. 326-328). That affidavit in-

[3] These depositions were given by Goberman and Blandino in a civil proceeding in the United States District Court for the District of New Jersey.

dicated that on February 24, 1975, Goberman represented to the United States District Court of the District of New Jersey, in a matter pending in that Court, that the Government, through its prosecutors, had in fact, promised him that in return for his testimony at trial they would recover and return to him the Hotel he had lost because of the alleged criminal acts of Petitioners. Trial counsel further indicated that inasmuch as the prosecution never revealed, and in fact, deliberately suppressed, the existence of this promise, the defense was improperly prevented from utilizing critical and relevant impeachment evidence and as such, petitioners were denied a fair trial and due process of law (J. 327).[4]

On or about March 4, 1975, the Government submitted its initial affidavit in opposition to the pending Rule 33 motions of Petitioners (J. 374 *et seq.*). The government's position was that the evidence described in the Parness affidavits was neither newly discovered, nor did it contradict Goberman's trial testimony (J. 377). Soon thereafter, and before the reply brief of Petitioners had been filed, the Government submitted a supplemental affidavit in opposition which, in substance, urged that the Government did not violate the holding of *Brady* v. *Maryland*, 373 U.S. 83 (1963) by non-disclosure of the promise to Goberman and that neither a new trial nor even an evidentiary hearing to determine whether to grant such a trial was necessary (J. 389-390).

[4] The litigious Mr. Goberman, commenced an additional action against the United States subsequent to the trial herein. In his complaint in that action, Goberman swore "Robert J. Cambell Esquire, Chief, Strike Force 18, Washingotn, D.C., advised plaintiff (Goberman) that Quote: 'The Government wants to convict the racketeers who stole the Hotel away from you and have it returned to you'." The District Court totally overlooked this statement (J. 549).

On March 17, 1975, Petitioners replied to the contentions of the Government and again urged that a new trial was necessary and in any event, a hearing should be held by the Court below concerning the issues raised (J. 391-409).

Thereafter, by letters dated March 24, and March 25, 1975, Petitioners' counsel informed the Court below that it had recently become known that Mr. Goberman had instituted a *pro se* action in the United States District Court for the Eastern District of Pennsylvania against the United States of America. In support of his claim, Goberman had annexed a series of letters written by him and addressed to the Government prosecutors involved in various facets of the investigation and trial conducted against the Petitioners. These letters, it was claimed, at the very least, should have been turned over to the defense as material within the purview of 18 U.S.C. 3500 and *Brady* v. *Maryland*, *supra* (J. 411-415).

It was further urged that these letters taken together with Goberman's post-trial statements made under oath which dramatically contradicted his trial testimony and the deliberate suppression by the Government of evidence favorable to the defense, mandated a new trial and in any event, a full evidentiary hearing before the District Court in the interest of justice (J. 412).[5]

Four months following the receipt of these letters, the Government submitted its "Second Supplemental affidavit in opposition" to the contentions of Petitioners (J. 435

[5] As will be discussed *infra*, Goberman's communications consisted of 26 letters written prior to trial and for the most part addressed to the attorney in charge of the "Parness prosecution" one R. J. Campbell. Several of these letters contain highly material and favorable information which go directly to the guilt or innocence of Petitioners.

et seq.). Although conceding the suppression of these letters, the prosecution, in essence, urged that the letters written by Goberman "were neither 3500 nor *Brady* material, and were not required to be turned over." Annexed to the Government's supplemental response were a series of affidavits by Harold F. McGuire, Jr., John M. Dowd, Michael B. Pollack and Robert J. Campbell, all of whom were involved in some facet of the prosecution of the Petitioners. Included as exhibits to the affidavits were an additional series of letters written by Goberman, a number of which pre-dated the trial and which were concededly never turned over to the Court below (J. 481-J. 519).[6]

In reply, Petitioners once again urged that a new trial be granted or in any event an evidentiary hearing be conducted by the Court below on the grounds *inter alia* that the prosecution suppressed both *Brady* material and documents producible under 18 U.S.C. 3500.

On September 29, 1975, the District Court, (Bonsal, *J.*) denied the motion (1a-9a). In its opinion, the District Court found that the newly discovered evidence found in Goberman's civil depositions was not sufficient to require a new trial inasmuch as the depositions revolved around Government's Exhibits 167-177 which were available at trial. The District Court further found that Goberman's concessions with respect to certain money and commissions due Milton Parness were not newly discovered because Parness had knowledge of these commissions at the time of trial. In addition, the District Court rejected the Petitioners' position with respect to the promises made to Goberman and categorized Goberman's statements made in open Court in the District of New Jersey as ambiguous.

[6] The originals of the letters all written in handprinted capital letters appear at J. 481-519. For the convenience of the Court, typewritten facsimiles appear at J. 566-J. 605.

Unfortunately, the District Court Judge failed to consider Mr. Goberman's sworn statement made in a separate proceeding (see *supra* fn. 4) that such a promise had been made.

Finally, the Court, though assuming that the letters were 3500 material nevertheless without a hearing, rejected Petitioners' claims with reference to the concededly undisclosed Goberman letters holding that since the letters were not directed to individuals connected with this case: the nondisclosure was inadvertent and that the letters failed to meet the "skilled counsel test" used in the Second Circuit.[7]

B. A Synopsis of the Proof of Trial

Although a full statement of the facts in this case may be found in *United States* v. *Parness*, 503 F.2d 430 (2d Cir. 1974) a brief synopsis of those facts, we believe, is appropriate for an understanding of the argument which follows.

During the course of the trial, the government contended that the Petitioners defrauded Allan Goberman of his 90.5% stockholdings in a large gambling casino-hotel corporation in the Netherlands Antilles. The petitioners according to Mr. Goberman, the prosecution's witness-in-chief, accomplished this by illegally diverting to their own use a part of the hotel corporation's receipts ("marker collections") and using those stolen receipts, loaned Goberman the sum of $160,000 for which Goberman pledged his entire stock interest. Thereafter, by continuing to divert or withhold part of the hotel corporation's receipts and by effectively keeping Goberman from

[7] As will be developed *infra*, the Court's factual findings with respect to the letters was wholly erroneous.

obtaining the necessary funds, the Petitioners, according to the prosecution, made it impossible for Goberman to repay the loan. The Petitioner Milton Parness was therefore able to foreclose on the shares and take control of the hotel and casino corporation.

It is beyond dispute that the central factual issue in this extraordinary prosecution was whether the Petitioners stole, converted or took by fraud $160,000 from the hotel corporation or Goberman. (This amount being a part of $350,000-$400,000 which Goberman claimed was converted.) Simply put, if the Petitioners did not owe Goberman any money on February 4 or February 9, 1971 the dates of the alleged interstate movement then they committed no crime.

C. A Synopsis of the Newly Discovered Evidence

On or about February 5, 1974, Allan Goberman, the prosecution's witness-in-chief and allegedly the victim of the Petitioners wrongdoing, commenced a civil action in the United States District Court for the District of New Jersey pursuant to the provisions of Title 18 United States Code section 1964 (J. 311-313). Mr. Goberman's civil action was predicated upon the Petitioners' conviction in the Southern District of New York. During the course of that civil proceeding, Goberman and one John Blandino, the manager of the Casino were deposed. During the course of those depositions, newly discovered evidence came to the attention of defense counsel which we submit, reveals that Goberman committed perjury in the criminal action as to several material matters and that the prosecution had either grossly negligently or intentionally suppressed evidence favorable to the defense and wilfully failed to advise the Court and defense counsel that perjured testimony was being given.

The genesis of the new evidence consisted of Mr. Goberman's admission that substantial and legitimate

deductions had to be made from the $350,000 to $400,000 amount that he had originally testified was due the casino. These deductions showed that in fact only $141,000 was due the casino and not the $350,000 to $400,000 (J. 27-35).[8]

In addition, the new evidence took the form of a series of concessions and admissions by Mr. Goberman that an additional $139,000 should have been credited to the Petitioners in computing what was legitimately owed to either the hotel corporation or to Goberman (J. 36-41).[9]

Wholly separate and apart from Mr. Goberman's admissions and recantations, was the testimony of John Blandino that the government had been advised by him of the above and had made written memoranda, but had failed to disclose these facts to either the Court or defense counsel (J. 203-309).

Finally, the new evidence took the form of 24 letters written by the Government's chief witness to Government attorneys who participated in the prosecution of the case. These letters were never provided or otherwise disclosed to the defense. Much of the information contained in the Goberman letters was of high value to the defense and belied the corner-stone of the Government's theory in prosecuting the Petitioiners.

In several of the letters, Goberman sought the prosecutor's aid in avoiding a deposition in a civil suit. The letters also revealed that Goberman expected help from the prosecution in recovering certain money seized by the Government which he claimed was his. Still others demon-

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[8] Computations have been rounded off.

[9] A detailed analysis of Goberman's concessions is contained in the affidavit of Milton Parness dated January 22, 1975 and the exhibits annexed thereto (J. 18-45).

strated the bias against the Petitioners and motive for testifying. In sum, the letters taken together, showed that the Government's chief witness was under extreme pressure to testify, whether truthfully or not, and that he was either a liar or deranged.

Reasons for Granting Writ

Introduction

This petition raises pressing and substantial questions of interpretation with regard to the suppression of evidence favorable to an accused. Moreover, a number of issues involved raise critically important questions under the due process clause of the 5th Amendment to the Constitution of the United States.

More specifically, this case raises the issue of whether a District Court was correct when it held that an assistant United States attorney, who tried the instant case, should not be charged with the knowledge of "strike force prosecutor" who although not directly involved with the trial, was responsible for the over-all investigation and preparation of Petitioners' case for trial.

Finally this petition places squarely before the court, the question of what standards should be applied by district courts in determining what quantum of evidence is necessary for the grant of new trial based upon newly discovered evidence which relates to the perjury of the government's witness-in-chief. Compare *United States* v. *Stofsky*, — F.2d — (2d Cir. Dkt. #74-1860 with *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973) and cases cited therein) indicating a sharp conflict between the circuits.

ARGUMENT

POINT I

The District Court erred in refusing to grant the appellant a new trial in view of the prosecution's deliberate non-disclosure of exculpatory material and material producible under 18 U.S.C. 3500. In any event, the District Court, in view of the government's admission of non-disclosure, should have granted Petitioners an evidentiary hearing on the issue of "deliberateness".

Subsequent to trial the appellants learned of the existence of a series of 24 letters written by Alan Goberman to various members of the prosecution team in charge of the instant case.[10]

The Government conceded its failure to disclose the letters although they had been aware of a number of them since December 1973, but maintained that the failure to disclose the written communications was inadvertent. Campbell in fact failed to submit any affidavit or offer any explanation for the nondisclosure of these letters.

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[10] The District Court in its written opinion denying Petitioners' Motion found: "The letters written by Goberman were each written to Department of Justice Attorneys who were not involved in the trial or its preparation" (J. 559). In fact perusal of the letters reveals that almost all of the letters (or copies thereof) were sent to R.J. Campbell and/or Harold McGuire, the attorney in charge of this prosecution and the trial attorney respectively submit that McGuire, the trial atttorney is chargeable with Campbell's knowledge. *See Santabello* v. *New York*, 404 U.S. 257 (1974); *United States* v. *Carter*, 454 F.2d 426 (3d Cir. 1972) and *Giglio* v. *United States*, 405 U.S. 150 (1975); and *Carter* v. *New Jersey*, 19 Cal. Rept. 2013 at 2014 (N.J. Sup. Ct. 3-17-76).

Without seeking an exposition of the facts or even proper responsive affidavits surrounding non-disclosure in an "adversarial context", the District Court found that "the Government's nondisclosure of those letters was inadvertent") (J. 559).

We respectively submit that inasmuch as the Goberman letters constituted both Jencks Act Material (18 U.S.C. 3500), and evidence favorable to the defense the District Court was compelled to conduct a hearing in an "adversarial context" on the issue of inadvertence and upon such hearing to grant a new trial. *United States* v. *Hilton*, 521 F.2d 164 (2d Cir., 1975).

18 United States Code, Section 3500 provides, in relevant part, as follows:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> * * * * *
>
> (e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to and witness called by the United States, means—(1) a written statement made by said witness and signed or otherwise adopted or approved by him; . . ."

It is undisputed that a number of the letters dealt with $60,000 being transported from Detroit to New

York ("the Norber Transaction") and that the "Norber Transaction" related generally to the events and activities testified to in Goberman's direct testimony. The Goberman letters are thus clearly Jencks Act or 3500 Material. See *United States* v. *Badalamente*, 507 F.2d 12, 17-18 (2d Cir., 1974). *Goldberg* v. *United States*, — U.S. — (1976) 18 Cr. L. Rept. 3161.

The legal standards to be applied in determining whether a new trial should be granted on governmental nondisclosure of Jencks Act material is now well settled. See, *United States* v. *Hilton*, *supra*, and the cases cited therein. Thus, if the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense.[11] *United States* v. *Hilton*, *supra*; *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1972); *United States* v. *Morell*, 524 F.2d 550 (2d Cir. 1975). If on the other hand, the Government's failure to disclose is merely inadvertent or negligent, a new trial is required if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid conviction. *United States* v. *Rosner*, 516 F.2d 269, 273 (2d Cir.); *United States* v. *Morell*, *supra*; *United States* v. *Seijo*, 514 F.2d 1357, 1364; *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir., 1974); *United States* v. *Miller*, 411 F.2d 825, 832 (2d Cir., 1969) and *United States* v. *McCrane*, — F.2d — (3d Cir., 1975). See also *United States* v. *Agurs*, 510 F.2d 1249 (D.C. Cir.), *cert. granted*, 17 Cr. L. Rept. 4069 (1975).

In the instant case, the "Goberman letters" were both material and favorable to the defense. They undercut several of the major premises made by the Government on

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[11] Deliberateness has been equated with gross negligence. *See*, *United States* v. *Miller*, 411 F.2d 825 (2d Cir., 1969); *United States* v. *Consolidated Laundries*, 291 F.2d 563 (2d Cir., 1961).

trial and of the Court of Appeals on the direct appeal. Moreover, the concession of the Government that it possessed those letters as early as December, 1973, leads to the inescapable conclusion that the suppression was deliberate. Consequently a new trial should be ordered.

The holding of the District Court, that the failure to disclose was "inadvertent" was apparently predicated upon the belief that "the Affidavits submitted by McGuire and Dowd establish that each was unaware of the existence of those letters which were in an administrative file in Washington, D.C., over which neither had control or responsibility" (J. 559-560). This assumption, we submit, has absolutely no basis in fact and is patently erroneous. Moreover, it fails to recognize that the affidavit of R.J. Campbell the recipient to most of the letters, is wholly silent on this subject (J. 454). It also ignores the now well established rule of "imputed knowledge" contained in *Giglio* v. *United States, supra.*

As indicated by the affidavit of Michael Pollack a member of the Strike Force in the Eastern District of New York, (which the District Court unfortunately elected to disregard) R.J. Campbell, Mr. Dowd's supervisor and Mr. McGuire were fully aware of Goberman's "complaints as embodied in his letters." Indeed Pollack's affidavit makes it crystal clear that on several occasions he attempted to arrange a meeting between Goberman and Campbell so that a face to face confrontation could be had regarding Goberman's written complaints (J. 452-453).

Perusal of those letters not expressly directed to members of the prosecution team reveal that they were written at the direction or suggestion of members of the team. Under these circumstances, one is hardpressed to find an example of a more deliberate non-disclosure. See *United States* v. *Morell, supra*, at p. 558.

Moreover, Campbell who was in charge of the prosecution was an experienced prosecutor who presumably knew of his obligation under *Giglio* and *Brady supra.*

We submit that this case presents an appropriate opportunity to enforce the admonition of the Chief Justice in *Giglio, supra* that procedures and regulations should be established in prosecutors offices that requires the right hand to know what the left hand is doing. This should be particularly easy when, as in this case, the suppressed material concerns the prosecutor's chief witness. See *United States* v. *Carter, supra* and *United States* v. *Duardi*, 384 F. Supp. 861 (W.D. Mo. 1973).

In *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir., 1973), the prosecution found itself in a position similar to the one in the instant case. In *Pacelli*, the prosecution urged, as here, that the failure to disclose letters written by its chief witness to one of the prosecutors was inadvertent and therefore harmless error. The Court of Appeals disagreed and held:

> "Accepting the government's assertion that these nondisclosures were inadvertent, we cannot agree with its characterization of them as 'harmless error'. Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial, none of this information conveyed quite so forcefully as Lipsky's letter to Morvillo the desperate state of Lipsky's mind after he had caused a mistrial by perjuring himself in the previous narcotics prosecution against Pacelli. The letter, furthermore, contains a blatant lie to the effect that his perjury, which caused the mistrial, had been unintentional rather than deliberate. Appellant's counsel would probably have sought to make this letter the 'capstone' of his attack on Lipsky's credibility, cf. *United States* v. *Miller, supra*, and argued that it revealed a frantic—even mentally disturbed—person who was ready to tell any lie to anyone in order to save himself from a murder conviction in the state court. Denial of the opportunity to use such forceful impeaching

material bearing on the credibity of the government's key witness mandates a new trial." (Footnotes omitted) (491 F.2d at 1119).

So, too in the instant case, the defense could have used the "Goberman letters" as one of the "capstones" of its cross-examination to demonstrate that Goberman had lied when testifying that he did not personally conduct junkets; that the Norber $60,000 was intended for Parness; and to demonstrate that members of the prosecution were aiding Goberman in his quest of the $60,000.

POINT II

The prosecution's suppression of evidence, including its chief witness's perjury requires the grant of a new trial. Moreover in affirming the District Court's denial of a new trial, the Court of Appeals applied an improper standard which conflicts with the standards of seven other circuits.

Subsequent to the trial of this action, the defense learned that notwithstanding its pre-trial request for exculpatory evidence the prosecution had suppressed certain facts which were highly favorable to the defense.

Moreover, in a number of civil depositions taken post verdict, the prosecutor's chief witness substantially recanted his trial testimony which formed the linchpin of the Government's case against the Petitioners. Given the fact that members of the prosecution team had documentary evidence of the Petitioners' innocence (e.g. the Goberman letters), taken together with Goberman's post-trial admissions, it must be inferred that the prosecution knew that their witness-in-chief was committing perjury as to material matters during his testimony. Under the traditional rules of fairness and due process the Petitioners should have been granted a new trial. Nevertheless, as will be discussed below, the Court of Appeals departed from these rules, and explicitly disavowed the standards previously promulgated in the Second Circuit and in seven other circuits to affirm the District Court's denial of a new trial.

The genisis of the standards of review governing most instances of newly discovered evidence has been the timhonord case of *Berry* v. *State*, 10 Ga. 511, 527 (1851). It was there held that new evidence will not entitled a defendant to a new trial unless "it would *probably produce* a different verdict" *United States* v. *De Sapio*, 456 F.2d 644, 647 (2d Cir. 1972).

However, appellate courts have deviated from the "probability" test and permitted new trials based on a less exacting demonstration when, as here, the prosecutors chief witness has committed perjury.

The so called "perjury" test which had its origin in *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928) requires a new trial if "*without the false testimony, the jury might have reached a different conclusion.*" *Larrison* v. *United States, supra; United States* v. *Meyers*, 484 F.2d 113, 116 (3d U.S. 1973). Under this test which is followed by a majority of the Circuits Courts of Appeal the Petitioners would have been granted a new trial.[12]

---

[12] See, e.g., *United States* v. *Anderson*, 509 F.2d 312, 327 n.105 (D.C. Cir. 1974) (dict), *cert. denied*, 420 U.S. 991 (1975); *United States* v. *Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (government witness recanted testimony); *United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973) (applying Larrison to perjury by material witness); *United States* v. *Briola*, 465 F.2d 1018, 1022 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108 (1973); *United States* v. *Curran*, 465 F.2d 260, 264 (7th Cir. 1972) (dict); *United States* v. *Strauss*, 443 F.2d 986, 989 (1st Cir.), *cert. denied*, 404 U.S. 851 (1971); *United States* v. *Smith*, 433 F.2d 149, 151 (5th Cir. 1970).

See generally 8A Moore Federal Practice sections 33.04(1) and 33.06(1). Despite the fairness of the well established *Larrison* test, the Second Circuit in *United States* v. *Stofsky*, — F.2d — (2d Cir. 11/7/75) Dkt. No. 74-1560) discarded that standard and held that the more onerous "probability" test should govern those cases involving perjury. It thus held that "the time-honored 'probability' standards is the more appropriate one for determining whether perjury calls for a new trial," *United States* v. *Stofsky*, *supra* at p. 530.

Based on *Stofsky*, its antecedants and progency, the Court of Appeals, in the instant case, thus, affirmed Petitioners' conviction (11a).

In view of the now present sharp distinction between the standards applied in the Second Circuit with the standards applied in the majority of the other circuits, this Court is presented with a most appropriate opportunity to harmonize the now varied guidelines in all cases of this sort. For this reason alone, we believe certiorari should be granted.

POINT III

The District Court erred by not ordering a new trial on the basis of newly discovered evidence.

In affirming the judgments of conviction against Petitioners the Court of Appeals specifically noted:

> "The record establishes that Hotel Corp. failed to receive approximately $400,000 in overdue marker accounts payable during a period when Parness was *solely responsible for and had exclusive control over marker collections . . .*
>
> *Shortly before the Goberman Loan, as noted above, agents of the Internal Revenue Service seized*

> *$60,000 in cash marker collections intended for Parness . . .*
>
> In short, in the context of this record and *in view of the complete absence of any credible explanation as to the source of the funds used in connection with the Goberman loan, we fail to see how the jury could have reached any conclusion except that Parness had withheld marker collections and had used the proceeds of such collections and the trust money to acquire Goberman's interest in Hotel Corp.*" (503 F.2d 436-437, emphasis supplied).

Thus, the decision of the jury and the opinion of the Court of Appeals was based upon three fundamental premises:

1.) That Goberman or the Hotel-Casino failed to receive $400,000 in marker collections;

2.) During this period Petitioner Milton Parness was solely responsible for and had exclusive control over marker collections;

3.) And as evidence of the second premise, shortly before the Goberman loan to Holzer was due, two agents of the Internal Revenue Service seized $60,000 in cash marker collections *intended for the Petitioner Milton Parness.*

Assuming *arguendo* the truth of Goberman's trial testimony, the conclusions reached by the Court of Appeals based on these premises were perhaps warranted. It must, of course, be further assumed that the jury credited Goberman's trial testimony as true so as to enable it to reach its verdict.

We submit, that the post-trial civil depositions of Goberman and undisclosed letters written by Goberman

to agents of the Government totally erode the aforestated fundamental assumptions upon which the Court of Appeals affirmed the judgment of conviction and presumably upon which the jury based its findings of guilt. This genre of new evidence further establishes beyond peradventure that Goberman's trial testimony was perjuriously false in numerous aspects so as to warrant a new trial as to Petitioners.[13]

As found by the Court of Appeals, Goberman's trial testimony established that the Hotel Corp., in which Goberman was purportedly a major stockholder, failed to receive approximately $400,000 at a time when Petitioner Milton Parness was solely responsible for and had exclusive control over marker collections. In actuality we submit, Goberman's post-trial civil depositions establish beyond peradventure that Milton Parness did not owe Goberman and/or Hotel Corp. even one penny, let alone $400,000. Based upon the material discrepancies between Goberman's trial testimony and his post-trial statements made under oath, it becomes crystal clear that Goberman committed perjury during the course of the trial in the Court below and that the prosecution knew or should have with due diligence known of this fact. In short, it is the position of the Petitioners that the newly discovered evidence demonstrates nothing less than that in truth and in fact, Milton Parness owed nothing to Goberman and/or Hotel Corp. and that the sum of $160,000 which allegedly crossed state lines on February 4 and February 9, 1971 could not therefore have been stolen or converted from Goberman and/or his Hotel Corp. as alleged in the indictment and at trial.

Notwithstanding his trial testimony, at his civil depositions, Goberman began to significantly alter his

[13] See Point II, *supra*.

position vis-a-vis the $400,000 (J. 104). Contrary to the decision by the District Court, the newly discovered evidence was in part, Goberman's grudging admissions at the post-trial deposition that the $400,000 figure he testified to at trial was incorrect and not the work sheets received in evidence as Government's Exhibits 167-177.[14] Since Goberman's admissions that the $400,000 figure was inaccurate were made subsequent to the trial and as such, were not available to the defense at trial, contrary to the determination of the District Court, we submit, Goberman's admissions did, as a matter of law, constitute newly discovered evidence. The effect of Goberman's post-trial sworn statements we submit, is to unequovocally demolish any factual basis for the critical finding made by the Court of Appeals to the effect that Milton Parness withheld "approximately $400,000." As aforestated, in actuality, such post-trial sworn statements make it clear that neither Petitioner owed Goberman and/or his Hotel even one penny. Thus, no crime was committed.

Similarly, a number of letters written by Goberman to the Government, through its prosecutors, erode the second and third fundamental assumptions necessary for the conviction to stand. It will be recalled that those assumptions were that Parness was solely responsible and had exclusive control over marker collections and that the $60,000 seized by the I.R.S. from one Norber, was intended for Parness. In actuality, the letters indicate, *inter alia*, that Goberman at the time he testified at trial

[14] Exhibits 167-177 were of course used in those depositions but solely as a point of reference following Goberman's admissions. Similarly, those exhibits were used in the Court below as a guide. It is noteworthy that the total of the accounts receivable in Exhibits 167-177 (e.g. gross marker pickups equals only $233,000 and not the $400,000 claimed at trial) (J. 35). This is but one example of deception practiced by the prosecution on the Court and trial counsel.

knew that the $60,000 was not in fact intended for Parness but was in fact actually to go to Goberman, himself. (J. 483, 585, 487, 592-595).

The import of those letters we submit, is crystal clear and unequivocally undercuts the basis of the indictment. They deal directly with the guilt or innocence of Petitioners. The letters indicate that the Norber money was intended to go directly to Goberman; that Campbell had the records to prove it and that Norber was responsible for collecting at least $60,000 in markers due. Thus. Petitioners could not have been solely responsible for or had exclusive control over marker collections.

In *United States* v. *Slutsky*, 514 F.2d 1222 (1975) the Second Circuit reiterated most succinctly what a movant must establish to be successful in obtaining Rule 33 relief:

> "To succeed on such a motion a defendant must show, *inter alia*, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937, 78 S.Ct. 1385, 2 L.Ed. 2d 1551 (1958), citing *Berry* v. *State*, 10 Ga. 511, 527 (1851)."

We submit, that on the basis of the requirements enumerated in *Berry* and *Slutsky*, the petitioners must succeed. Clearly, Goberman recanted his tiral testimony concerning the $400,000 at a post trial civil deposition. This evidence was clearly discovered after trial and could not, with the exercise of due diligence have been discovered sooner. Moreover, it is crystal clear that the truth was known to the prosecutors who inexplainably remained

silent. That it is so material that it would probably produce a different verdict is doubtless established by the fact that the Court of Appeals considered Goberman s trial testimony to the effect that his Hotel "failed to receive approximately $400,000 in overdue markers" as a critical underpinning of its own opinion affirming the judgments of conviction.

Similarly, since the letters heretofore referred to herein were addressed from Goberman to the Government, through its prosecutors, who never turned the same over to the defense or made them available to the Court in camera, they could not with the exercise of due diligence have been discovered sooner.

That the letters are so material as to probably produce a different verdict is once again established by the fact that the Court of Appeals considered Goberman's trial testimony to the effect that the $60,000 was intended for Parness and not himself as a further critical underpinning of its own opinion affirming the judgments of conviction.

The letters further demonstrate that inasmuch as Goberman and Norber were collecting their own "markers," Parness could not have had exclusive control over marker collections.

While it has been said that Courts of Appellate Review have a proper interest in not disturbing the verdicts of juries, such interest should not result in the sanctioning of a gross miscarriage of justice. To permit such a strained resurrection of affirmatively rejected evidence in an effort to preserve a verdict is a license not granted by the Constitution. There is the greater interest which is to be found in all Courts and that is to see that all convictions rest on proper and sufficient evidence. To do otherwise . . . is to abandon a singularly important function. In truth, the greatest function of all Courts

of Appellate Review is to be ever vigilant to the erosions of due process and to quickly stem efforts to prescribe constitutional rights in the name of expediency. The only true interest in the finality of litigation is that finality which is achieved with due process.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted; the judgments of conviction should be reversed and a new trial should be granted.

April, 1976

Respectfully submitted,

JOHN L. POLLOK
Attorney for Petitioners

APPENDIX

APPENDIX A

Opinion of District Court on Motion for New Trial (September 29, 1975)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

73 Cr. 750

UNITED STATES OF AMERICA,

—v.—

MILTON PARNESS and BARBARA PARNESS,
Defendants.

HON. PAUL J. CURRAN,
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Southern District of New York
Attorney for the United States of America

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Of Counsel

Appendix A—Opinion of District Court on Motion for New Trial (September 29, 1975)

Memorandum

BONSAL, *D. J.*

Defendants Milton and Barbara Parness move pursuant to Fed.R.Cr.P. 33 for a new trial based on newly discovered evidence on the ground that "the testimony of the prosecution's witness-in-chief was false as to material matters" and "that at the time of trial the United States Attorney knew or should have known of material evidence favorable to the defendants which was not disclosed or made available to the defendants."[1] Argument was had before the Court on August 27, 1975, limited to the issue of whether a hearing was necessary on defendant's motion.

Defendant Milton Parness was convicted on October 3, 1973, by a jury, of acquiring control of the St. Maarten Isle Hotel Corporation ("Casino-Hotel") in St. Maarten, Netherlands Antilles through a pattern of racketeering in violation of 18 U.S.C. §§ 1961, 1962(b) and 1963 (Count 1), of two counts of causing interstate transportation of stolen property, 18 U.S.C. § 2314 (Counts 4 and 5), and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, 18 U.S.C. § 2314 (Count 6). Milton Parness' wife, Barbara Parness, a co-defendant at this trial, was convicted on Counts 4, 5 and 6. Defendants each were sentenced on December 7, 1973. On June 27, 1974, the Second Circuit affirmed their convictions (503 F.2d 430 (2d Cir. 1974)), and on January 13, 1975 the Supreme Court denied certiorari (419 U.S. 1105 (1975)). Thereafter, Defendants made the instant motion for a new trial.

---

[1] Defendants also appear to move for a new trial "in the interest of justice" on the ground "that there exists evidence of material facts not heretofore presented . . . which require vacation of the judgment." This motion is denied as untimely. See Fed. R.Cr.P. 33; *United States* v. *Smith*, 331 U.S. 469, 474-75 (1947).

Appendix A—Opinion of District Court on Motion for New Trial (September 29, 1975)

I.

In order to grant a new trial based on newly discovered evidence, a defendant must show

> "*inter alia*, (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict." *United States* v. *Slutsky*, 514 F.2d 1222, 1225 (2d Cir. 1975) (citations omitted).

The burden of proof is a stringent one since motions for a new trial based on newly discovered evidence "are not held in great favor." *Id; United States* v. *Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). *See United States* v. *Franzese*, 321 F. Supp. 993 (E.D.N.Y. 1970), *aff'd.* 438 F.2d 536 (2d Cir.), *cert. denied*, 402 U.S. 995 (1971).

Defendants initially allege that Allan Goberman (the Government's key witness at trial) in connection with the civil action filed by him against Defendants in the United States District Court for the District of New Jersey on February 3, 1974 (four months after trial), gave testimony in a deposition which differed from that given at Defendants' trial, and that this constituted newly discovered evidence.

A. Defendants first contend that in the deposition Goberman substantially modified the testimony he gave at trial as to the amount owed to him by the Casino-Hotel or Milton Parness. At trial Goberman testified that he believed he was owed approximately $400,000 in gross

marker "pick ups" as of February, 1971, and stated that he relied largely upon work sheets from the Casino-Hotel showing "win-loss totals and marker pick ups" during the period from October, 1970 through January, 1971. These work sheets were received in evidence as Government's Exhibits 167 through 177. Defendants' counsel cross-examined Goberman at length with respect to his estimates and used the exhibits in his summation. Defendants' present calculations and conclusions are based solely on the same exhibits and do not constitute newly discovered evidence.

B. Defendants contend that Goberman's testimony at trial about the money owed him by Milton Parness in unremitted marker pick ups was false in that Goberman did not state that Parness was entitled to deduct certain commissions from the gross marker pick ups that Parness was to collect. This contention does not entitle Defendants to a new trial because of newly discovered evidence. *See United States* v. *Slutsky*, 514 F.2d 1222 (2d Cir. 1975). Defendants were the recipients of these commissions and Milton Parness demonstrated his knowledge of them when he testified at a hearing before this Court. In addition, Goberman referred to these commissions in his direct testimony at trial.

C. Defendants contend that the existence of checks constituting remittances from Milton Parness' corporation, Olympic Sports Club, Inc., to the Casino-Hotel during December, 1970 and January, 1971 which should have been credited to the amount owed to Goberman was not revealed to Defendants by the Government during or prior to trial. The trial record shows that these checks were reflected in the evidence at trial, specifically in Government's Exhibit 155, which Defendants' counsel used for

cross-examination and in summation. Moreover, the checks were written on the account of Olympic Sports Club, Inc., the corporation controlled by Milton Parness, who knew or should have known of their existence at trial. *See United States* v. *Slutsky, supra.*

Accordingly, none of the foregoing items constitute newly discovered evidence.

Additional claims of newly discovered evidence have been raised by defendants since they filed their motion, which evidence they assert was known to the Government but not disclosed to defendants at trial. Defendants contend that the Government failed to disclose to them that it had promised Goberman that it would recover for him the Casino-Motel and that the existence of this promise is supported by statements made by Goberman on February 24, 1975 during oral argument on his motion for summary judgment in the *pro se* action he filed against defendants in February, 1974, four months after the trial, in the District Court of New Jersey. Specifically, Defendants rely on Goberman's statement to the Court in New Jersey:

> "The reason why your Honor, I brought my claim under Section 1964D, and I may be, as you explained it, wrong is the fact that the United States government was supposed to have sued for the recovery under that act and to have recovered the hotel and returned it to me, and I'm trying to put myself in their position." Transcript, Feb. 24, 1975, at 17-18.

The Government contends that this statement is ambiguous and, in any event, contends that no promise of this nature was made.

Defendants also contend that letters and other documents ("letters") written by Goberman between December, 1972 and January, 1974 to certain prosecutors who had investigated the case against Defendants [2] constituted either 3500 or *Brady* material. Defendants state that they discovered these letters in a file in an action filed in mid-1973 (apparently at approximately the time of Defendants' trial) by Goberman against the United States, 73 Civ. 2669, in the District Court for the Eastern District of Pennsylvania, seeking recovery of $60,815 taken by the Internal Revenue Service from one Sam Norber, which money Goberman contends Norber owed him as marker receipts. Defendants first contend that these letters establish that the Government promised to obtain for Goberman the $60,815 taken from Norber. Defendants also rely on statements in the letters such as: a reference in a letter dated December 13, 1972 to the government's intention "to persue [sic] the Fish-Weinberg matter . . ." and to recover monies from those persons which were allegedly obtained by fraud; a letter dated August 23, 1973 addressed to "Dear Mike" and signed "Allan"; a statement in a letter dated January 11, 1973 that "I (Goberman) trust the following two persons are in good health (1) your charming wife (2) your beautiful baby . . ."; and a statement in a letter dated January 22, 1973 "Mike, I've at all times done (anything) everything you've asked me to do . . ." The Government concedes that these letters were in an "administrative" file in Washington, D.C. but contends that no promise was made to recover the $60,815 and that the letters themselves and Goberman's institution of the Pennsylvania lawsuit support this contention. The

[2] Defendants also rely upon one letter which was written by Goberman's attorney, H. Joseph Flynn, Esq., on July 31, 1973, to Harold P. McGuire, Jr., the Assistant United States Attorney who represented the Government at trial.

Government further contends that in any event the letters are neither 3500 nor *Brady* material. The Government contends also that if the letters were found to be 3500 or *Brady* material, the affidavits of Harold P. McGuire, Jr., the Assistant United States Attorney representing the Government at the trial, and John M. Dowd, the only other Government attorney who participated in the preparation of the trial, establish that failure to turn over these letters was inadvertent and that nothing in them warrants granting a new trial.

The Court notes that Defendants' contentions about Government promises to Goberman to recover his property may arise from the unusual provisions contained in the anti-racketeering statute (18 U.S.C. § 1961 *et seq.*), which provide in section 1963(a) that whoever is convicted thereunder "shall forfeit to the United States" any property acquired in violation of the statute, and in section 1963(c) that the Attorney General is authorized to seize such property and to dispose of it "as soon as commercially feasible, making due provision for the rights of innocent persons."

Of course, these provisions were known to Defendants' counsel at the time of trial and indeed were discussed informally with them by the Court on the question of their applicability to property like the Casino-Hotel, which is located on St. Maarten, Netherlands Antilles, outside the United States and hence outside of its jurisdiction.

In any event, the statute provided adequate basis for cross-examination of Goberman as to whether he expected to get the Casino-Hotel back as an "innocent person" and for argument before the jury that he was testifying for that purpose.

Defendants' contention that there is newly discovered evidence demonstrating that the Government promised Goberman that it would recover his Casino-Hotel (or remit the $60,815 taken from Norber) is without merit and does not entitle them to a new trial. A full reading of Goberman's statements at the oral argument on February 24, 1975 before the District Court in New Jersey reveals only that the statements are ambiguous and that Goberman did not understand the legal status of the Casino-Hotel (which appears to have been forfeited to the government of the Netherlands Antilles on Goberman's failure to pay that government over $1-million). It is also noted that nothing in the letters in question suggests the existence of a promise to recover the Casino-Hotel, which promise each of the Government attorneys denies. *See Williams* v. *United States*, 503 F.2d 995 (2d Cir. 1974).

Insofar as Defendants seek a new trial on the basis of the letters found in the files of Goberman's Pennsylvania lawsuit, the Court finds that even assuming (but not so holding) that the letters were 3500 or *Brady* material, there is no basis for granting a new trial.

The Court finds that the Government's nondisclosure of these letters was inadvertent. The letters written by Goberman were each written to Department of Justice attorneys who were not involved in the trial or in its preparation. The one letter written to McGuire, the Assistant United States Attorney who represented the Government at the trial, was sent by J. Joseph Flynn, Goberman's attorney, on July 31, 1973, and merely referred to Goberman's "claim against the Internal Revenue Service for $60,000.00, which Mr. Goberman feels is

owed to the Casino . . ." and does not suggest any promise by the Government to recover the Casino-Hotel for him. Moreover, the affidavits submitted by McGuire and Dowd establish that each was unaware of the existence of those letters which were in an administrative file in Washington, D.C., over which neither had control or responsibility.

Since Defendants have failed to show that "there is a significant chance that [those letters], developed by skilled counsel as [they] would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction," see *United States* v. *Rosner*, 516 F.2d 269, 272 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973), Defendants are not entitled to a new trial on the basis of the letters.[3]

Accordingly, Defendants' motion for a new trial is denied.

It is so ordered.

Dated: New York, N.Y.
September 29, 1975

DUDLEY B. BONSAL
U.S.D.J.

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[3] The Court also concludes that the findings herein, based upon the parties' extensive briefs and supporting affidavits, satisfy the requirements of *United States* v. *Hilton*, Dkt. No. 74-2675 (2d Cir. Aug. 8, 1975) and *United States* v. *Morell*, Dkt. No. 74-1827 (2d Cir. Aug. 29, 1975).

APPENDIX B

Memorandum—Order of Court of Appeals Affirming Denial of New Trial (January 7, 1976)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed Jan. 7, 1976

A. DANIEL FUSARO, *Clerk*

75-1369, 75-1370

UNITED STATES OF AMERICA,

Appellee,

—v.—

MILTON PARNESS and BARBARA PARNESS,

Defendants-Appellants.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of January, one thousand nine hundred and seventy-six.

Present:

HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. THOMAS J. MESKILL

Circuit Judges

Appeals from the United States District Court for the Southern District of New York.

Appendix B—Memorandum Order of Court of Appeals Affirming Denial of New Trial (January 7, 1976)

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the orders of said District Court entered September 29, 1975 denying appellants' motions for a new trial be and they hereby are *affirmed* on the well reasoned opinion of Judge Bonsal dated September 29, 1975 and upon the authority of the decisions of this Court in *United States* v. *Miranda*, Dkt. No. 74-2651 (2 Cir., Dec. 3, 1975), slip op. 6545; *United States* v. *Stofsky*, Dkt. No. 74-1860 (2 Cir., Nov. 7, 1975), Slip op. 515 and *United States* v. *Zane*, 507 F.2d 346 (2 Cir. 1974), cert. denied, — U.S. —. His findings of fact are not clearly erroneous and we agree with the legal standards he applied. The order entered September 2, 1975 denying a motion for reduction or vacation of sentence as to appellant Milton Parness is *affirmed*. The mandate shall issue forthwith.

By: /s/ WILLIAM H. TIMBERS
WILLIAM H. TIMBERS

By: /s/ ELLSWORTH A. VAN GRAAFEILAND
ELLISWORTH A. VAN GRAAFEILAND

By: /s/ THOMAS J. MESKILL
THOMAS J. MESKILL

Circuit Judges

APPENDIX C

Memorandum—Order of Court of Appeals Denying Stay of Mandate (January 12, 1976)

UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

September Term, 1975

(Submitted January 9, 1976 Decided January 12, 1976)

Docket Nos. 75-1369, 75-1370

UNITED STATES OF AMERICA,

Appellee,

—v.—

MILTON PARNESS and BARBARA PARNESS,

Defendants-Appellants.

Before:

TIMBERS, VAN GRAAFEILAND and MESKILL, Circuit Judges.

Motion to recall and stay mandate following our unanimous affirmance by memorandum order entered January 7, 1976 of orders of the United States District Court for the Southern District of New York, Dudley B. Bonsal, *District Judge*, entered September 29, 1975 and September 2, 1975, denying both appellants' motions for a new trial and denying appellant Milton Parness' motion for reduction or vacation of sentence; our order of January 7, 1976, which also directed that the mandate issue forthwith, having followed our earlier unanimous affirmance on June 27, 1974 of appellants' convictions, after jury trial before Judge Bonsal, of causing interstate transportation of stolen property, of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, and (in the case of appellant Milton Parness) of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering activity. 503 F.2d 430, *cert. denied*, 419 U.S. 1105 (1975).

Appendix C—Memorandum Order of Court of Appeals Denying Stay of Mandate (January 12, 1976)

Motion to recall and stay mandate denied.

Joel N. Rosenthal, Asst. U.S. Atty., New York, N.Y. (Thomas J. Cahill, U.S. Atty., Lawrence B. Pedowitz and John C. Sabetta, Asst. U.S. Attys., New York, N.Y. on the brief), *for appellee.*

Jay Goldberg, New York, N.Y. (Michael Ratner and Henry J. Boitel, New York, N.Y., on the brief), *for appellant Milton Parness.*

John L. Pollok, New York, N.Y. (Edward Gasthalter, and Gasthalter & Pollok, New York, N.Y. on the brief), *for appellant Barbara Parness.*

Per Curiam:

The chief significance of the instant motion to recall and stay the mandate is that it is the latest in a series of maneuvers to avoid surrendering to serve a ten year sentence imposed by Judge Bonsal *more than 25 months* ago upon appellant Milton Parness who was presented as a dangerous special offender. We deny the motion.

In affirming by a memorandum order on January 7, 1976 appellants' latest appeal from orders denying their

latest motions for a new trial and for reduction or vacation of Milton Parness' sentence, we found their claims of error to be so frivolous that we ordered that the mandate issue forthwith. For the same reason, we deny the instant motion to recall and stay the mandate.

Our affirmance of January 7, 1976, so far as the appeals from the denials of new trials are concerned, was based on the well reasoned opinion of Judge Bonsal of September 29, 1975. Specifically, we held that "[h]is findings of fact are not clearly erroneous and we agree with the legal standards he applied." Such affirmance, moreover, was upon the authority of three recent decisions of our Court, including *United States* v. *Zane*, 507 F.2d 346 (2 Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), where Judge Medina for a unanimous Court stated:

> "The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. . . . It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials." 507 F.2d at 347-48.

In emphatically denying the instant motion to recall and stay the mandate, we also do not blind ourselves to the prior criminal record of appellant Milton Parness dating back to 1958. His record includes two prior felony convictions, in 1963 and 1965, for conspiring to transport, and for transporting, stolen securities in interstate commerce. For these offenses, consecutive sentences totalling nine (later reduced to seven) years imprisonment were imposed. He was released from the United States Penitentiary at Lewisburg, Pennsylvania, on June 6, 1969. *During the period of his mandatory release supervision or parole*, which did not expire until February 1971, *Milton Parness became engaged in the fraudulent scheme for which he was convicted in the instant case*, 503 F.2d at 434-35, and ultimately was sentenced on December 7, 1973 as a third felony offender.

There comes a time in every federal criminal prosecution when a defendant, who has been accorded due process at the three levels of the federal judicial system and whose claims of error have been weighed and found wanting, should be required to serve the sentence which has been imposed upon him according to law. Otherwise, he makes a mockery of federal criminal justice.

We think it is high time that the curtain be brought down on the charade by which appellant Milton Parness —by various motions and frequent substitutions of counsel—has maneuvered for more than 25 months to avoid surrendering to serve his sentence of imprisonment and to avoid paying the $55,000 fine imposed upon him.

We order that appellant Milton Parness surrender forthwith and start serving immediately his ten year sentence of imprisonment; that appellant Barbara Parness start serving immediately her three year sentence of probation; and that both appellants pay forthwith the fines of $55,000 and $6,000, respectively, imposed upon them on December 7, 1973.

Appendix C—Memorandum Order of Court of Appeals Denying Stay of Mandate (January 12, 1976)

The motion to recall and stay the mandate is denied in all respects.

This Court will not grant any further motions for recall or stay of the mandate or for stay of execution of the sentences or for stay of this order.

It is so ordered.

APPENDIX D

Constitutional, Statutory and Regulatory Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes

18 U.S.C. § 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the

United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered didectly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any

statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

Appendix D—Constitutional, Statutory and Regulatory Provisions Involved

Federal Rules of Criminal Procedure

RULE 33, NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966.